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GENE McNARY, Commissioner of Immigration and Naturalization Service, et al.,

Petitioners,

vs.

HAITIAN REFUGEE CENTER, INC., et al.,

Respondents.

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Whether the district courts are wholly precluded by 8 U.S.C. § 1160(e) from asserting general federal question jurisdiction, 28 U.S.C. § 1331, or statutory immigration jurisdiction over matters arising under Title II of the Immigration and Nationality Act, 8 U.S.C. § 1329, by 8 U.S.C. § 1160(e), where organizational, as well as individual plaintiffs, challenge the constitutionality of INS practices and policies that make meaningful individual review impossible.

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STATEMENT OF THE CASE

By enacting the Immigration Reform and Control Act of 1986, Congress addressed the persistent problems of a uniquely vulnerable and perenially exploited group by creating an amnesty program for alien farmworkers in the United States. The question presented by this case is whether the district courts are wholly precluded from exercising their general federal question jurisdiction under 28 U.S.C § 1331 or their statutory immigration jurisdiction under 8 U.S.C. § 1329 to hear a case that does not seek review of the determination of any amnesty application, but instead raises a constitutional challenge to INS practices and policies which frustrate the Congressional goal of a generous amnesty program and deny individual applicants a meaningful opportunity to be heard.

A. The Special Agricultural Worker Program

As part of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, Congress required that the Attorney General grant residency under a Special Agricultural Worker ("SAW") program to alien farmworkers who performed seasonal agricultural services and who otherwise qualified under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1160 *et seq*. Congress heard extensive testimony on the effect that employer sanctions would have in removing a substantial number of undocumented individuals from the agricultural work force. The program was designed to respond to the growers' concerns regarding the availability of labor and "at the same time to protect workers to the fullest extent of all applicable federal, state and local laws . . . to provide them with a status that ensures that their employment is fully governed by all relevant law without exception." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt.1, 83-84 (1986).

Under the SAW program a farmworker was eligible to become a temporary resident if he or she (1) resided in the United States and performed seasonal agricultural services for at least ninety (90) man-days during the twelve (12) month

period ending on May 1, 1986 and (2) was admissible as an immigrant. 8 U.S.C. § 1160(a)(1)(B). To be eligible for the program, the SAW applicant had to apply for adjustment of status to temporary residency during the eighteen (18) month period beginning on June 1, 1987. 8 U.S.C. § 1160(a)(1)(A). The application period expired on November 30, 1988.

Congress specifically recognized that farmworkers would have a difficult time in establishing their eligibility for SAW status given the "unique documentation of work history problems in agriculture." H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 97 (1986). The lack of pay records for agricultural employees, resulting from small employer exemptions from wage and hour laws, as well as from employment by farm labor contractors or others whose record keeping practices were deficient, led Congress to conclude that "fairness dictates they create a presumption in favor of worker evidence, unless disputed by specific evidence adduced by the Attorney General." *Id.*

Congress also recognized that potential applicants for legalization in general were members of a "fearful and clearly exploitable" subclass within American society, S. Rep. No. 132, 99th Cong., 1st Sess. 16 (1985), naturally wary of government authority. H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt.1, 49 (1986). Congress heard extensive testimony that legalization applicants would have great hesitation in submitting applications because they were fearful that the applicants would not be approved and that they would be arrested and deported. *See, e.g., Immigration Reform and Control Act Hearings on H.R. 1510 Before The Subcommittee On Immigration, Refugees and International Law Of The House Committee On The Judiciary*, 98th Cong., 1st Sess. 783, 789 (1983) (statement of Dale DeHaan, American Council for Volunteer Agencies); *id.* at 844-45, 855-56 (statement of John Huerta, Mexican American Legal Defense and Education Fund).

Because the failure of a significant number of alien farmworkers to submit applications would defeat the purpose of the legislation, Congress shaped the statutory scheme to encourage farmworkers to come "out of the shadows" and

submit applications. First, Congress directed the Attorney General to "designate qualified voluntary organizations and other qualified State, local, community, farm labor organizations, and associations of agricultural employers," to receive applications directly from farmworkers. INA § 210(b)(2), 8 U.S.C. § 1160(b)(2). These "qualified designated entities" ("QDEs") would reach out to the alien community to encourage, counsel and assist them in applying for legalization. In order to insure that farmworkers would come forward without penalty, Congress, in effect, erected a wall of confidentiality between the QDEs and the Attorney General. The QDEs could only forward applications to the Attorney General where the applicant had consented to it.

Congress also prohibited, by statute, the Attorney General and the Immigration and Naturalization Service ("INS") from having access to the files and records of the QDE that related to a farmworker "without the consent of the alien." INA § 210(b)(4), (5), 8 U.S.C. § 1160(b)(4), (5). With these mechanisms in place, Congress hoped "that by working through the voluntary agencies, the Attorney General might be able to encourage participation among undocumented aliens who fear coming forward . . . The confidentiality of the records [of QDEs] is meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, 73 (1986). *See also*, S. Rep. No. 132, 99th Cong., 1st Sess. 47 (1985) (the QDE provision is aimed "to assure applicants that they may apply to such entities without fearing that their applications will be forwarded to the INS even if in the view of such entities they do not qualify for legalization").

In short, by providing a network of QDEs, "Congress meant to permit aliens unsure of their status to step forward *tentatively*, obtain accurate and confidential advice about legalization, and *only then* decide whether to submit an application to the INS." *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1356 (D.C. Cir. 1989) (Wald, J., dissenting).

Second, Congress erected an additional wall of confidentiality. It prohibited, under criminal penalty, the Attorney General, and any other official employee of the Department of Justice, including INS officials, from using any information contained in a SAW application for enforcement purposes, including the initiation of deportation proceedings. INA § 210(b)(6), 8 U.S.C. § 1160(b)(6). The confidentiality provision insured that if an application was denied, INS could not initiate deportation proceedings based on the information obtained in the application. If INS wished to initiate deportation proceedings, it could only do so *if* it obtained information through an independent source as to the farmworker's unlawful status.

Third, Congress sought to encourage farmworkers to submit applications by providing work authorization upon the submission of a "nonfrivolous application" for SAW status which they would maintain during the course of their application process. INA § 210(d)(2), 8 U.S.C. § 1160(d)(2).

B. The Application Process

The application process for the SAW program began at a personal interview held at a legalization office ("LO"), a local office of the INS authorized to accept and process applications. 8 C.F.R § 210.1(i) (1990).[1] The interviewing office could deny the application, recommend that it be denied, or recommend that it be granted. Those applications that were not denied by the interviewing officer were forwarded to a regional processing facility ("RPF") for adjudication. If a denial issued either from the LO or the RPF, the applicant had to appeal the decision to the legalization appeals unit ("LAU") which would make the final administrative decision on SAW applications. Petitioners' Appendix ("Pet. App.") 22a. Subsequent to the final administrative decision by the LAU, an applicant could seek review in a federal court of appeals only as part of the review of a final order

[1] Regulations to implement the SAW provisions are codified at 8 C.F.R. §§ 103 and 210. 52 Fed. Reg. 16,190 *et seq.* and 16,195 *et seq.* (May 1, 1987).

of deportation or exclusion thereby requiring the applicant to have undergone such deportation or exclusion proceeding. 8 U.S.C. § 1160(e)(3).

The interview process was central to the determination of SAW status. The immigration officer at the LO was asked to determine the credibility of the applicant and the documentation he or she presented regarding eligibility. 8 C.F.R. §§ 210.2(c)(4)(i) (the applicant must establish to the satisfaction of the examining officer during an interview that his or her claim to eligibility for special agricultural worker classification was credible); and 210.3(b)(2) (the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility). Moreover, the personal interview was of utmost importance because, as the district court found, "farm labor contractors and other agricultural employers often do not maintain accurate employment records. [T]his makes it difficult and, in many cases, impossible for a farmworker to produce formal documentation. Farmworkers are likely to be paid in cash by farm labor contractors whose lists of workers are often incomplete." Pet. App. 28a-29a.[2]

The interview is "the only face-to-face encounter between the applicant and the INS allowing the INS to assess the applicant's credibility." Pet. App. 28a. Because the INS did not record or prepare a transcript of the interview, the only record created in the case was established on the INS officer's worksheet, Form I-696. Pet. App. 28a. The record created by the INS officer on the I-696 was of paramount importance because the administrative appeal to the LAU was

[2] In passing the SAW legislation, Congress was fully aware of the documentation problem. Congress utilized the standards employed in the Fair Labor Standards Act and granted a presumption to SAW applicants recognizing that there may be "employee loss of records, destruction or falsification of records by employers, and other difficult circumstances where precise evidence of hours worked is lacking. H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 97 (1986). IRCA formalized the presumption in favor of applicants. 8 U.S.C. § 1160(b)(3)(B)(iii).

to "be based solely on the administrative record established at the time of the determination on the application" unless there was newly discovered evidence. 8 U.S.C. § 1160(e)(2)(B).

Similarly, judicial review of an individual denial was to "be based solely upon the administrative record established at the time of the review of the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole." 8 U.S.C. § 1160(e)(3)(B). Thus, under petitioners' procedure, the personal interview at the LO was the only opportunity to present testimony. The interviewer's notes on the I-696, together with whatever written documentation was submitted, constituted the "record" which was to be the "sole" basis for review by the RPF, the LAU and ultimately, the circuit court. Pet. App. 7a, 28a; 8 U.S.C. §§ 1160(e)(2)(B), (e)(3)(B).[3]

C. The Proceedings In The District Court

This action was filed on June 13, 1988 by the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach ("MRS"), a qualified designated entity, the Haitian Refugee Center, Inc. ("HRC"), a nonprofit membership organization which provides legal representation to Haitian refugees, "including Haitians who are seeking benefits under IRCA's SAW program," Joint Appendix ("J.A.") 23, as well as a class of SAW applicants which included farmworkers who had not yet applied under the program, but who would be denied SAW status "because of the Defendants' unlawful policies and practices." J.A. 34-35.

The Plaintiffs' complaint sought declaratory, mandatory and injunctive relief to prevent their continued injury as a

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[3] The applicant for SAW status has no opportunity to reopen the proceedings once the "record" is established on the I-696 by the legalization officer. 8 C.F.R. § 103.5 ("motions to reopen a proceeding or reconsider a decision under part 210 . . . of this chapter shall not be considered").

result of the "unlawful practices and polices" of the INS that "imposed an interview procedure which violates the applicants' Fifth Amendment right to due process by failing to provide interpreters, failing to allow the applicants to rebut adverse evidence, and refusing to allow the applicants to present witnesses on their own behalf." Pet. App. 19a-20a.[4]

The preliminary injunction hearing produced evidence that demonstrated the existence of policies and practices of INS at the SAW interview that would unconstitutionally deprive farmworkers of a "meaningful" opportunity to be heard. Pet. App. 50a. The evidence revealed that under its policies and practices INS did not record or prepare a transcript of the interview. Pet. App. 7a, 28a, J.A. 61-62 (stipulation of counsel). In addition, the worksheets used by INS officers to take notes on the interview (I-696) often contained "very little information about the interview" and sometimes, "were completely blank." Pet. App. 8a. As the court of appeals noted, "without any record of what transpired at the interview . . . the review provided for in IRCA is meaningless." Pet. App. 16a. The injunctive relief sought and obtained merely required INS interviewers "to particularize the evidence offered, testimony taken, credibility determinations and any other relevant information on the form I-696" so that a record for review would be available. Pet. App. 57a.

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[4] The plaintiffs also brought other challenges to INS's policies and practices, including the petitioners' reliance on an impermissible standard of proof. As the petitioners acknowledge, they "did not challenge those paragraphs of the preliminary injunction on appeal." Petitioners' Brief ("Pet. Br.") at 7 n.5. Notwithstanding petitioners' claim that they continue to appeal the jurisdictional issue with respect to the first five paragraphs of the lower court's injunction, their brief to the court of appeals sought appeal only as to issues relating to the interview process. Appellants' Opening Brief at 16 n.3 ("defendants/appellants have advised plaintiffs . . . that INS would fully comply with the terms of paragraphs one through five of the injunction which will eventually render moot the first through fifth claims of the complaint"). Indeed, the INS did seek to render these issues moot on August 26, 1988 by issuing a cable requiring the legalization offices in the Eleventh Circuit to utilize new procedures.

The evidence also revealed that although ninety percent (90%) of the applicants at the legalization office spoke either Spanish or Haitian Creole, Pet. App. 9a, under its policies and practices, "the INS d[id] not provide interpreters . . . at the interview for applicants for Special Agricultural Worker (SAW) status," J.A. 61-62, and the LO where a significant number of Haitians applied "never had an employee who spoke Creole." J.A. 61-62. Cultural differences and the poor quality of the translations created a great potential for misunderstanding and confusion as to the applicant's testimony. Record ("R.") at First Supplement ("1st Supp."), Vol. 1, pp.9-10; R. at 2d Supp., Vol. 2 pp.41, 89. The "record" of the interview for appeal "neither identified the name of the interpreter nor indicate[d] whether an interpreter was used." Pet. App. 9a, 27a-28a. These errors were, as a practical matter, insulated from correction because the INS did not make the I-696 available for inspection by applicants except pursuant to a request under the Freedom of Information Act. J.A. 62.

Evidence was also presented regarding the lack of an opportunity to present witnesses at the LO. Although INS' treatment of the applications "enhance[d] the importance of live witnesses to the application process," in practice, "applicants had been prevented from presenting witnesses . . . [and] some LOs disallowed witness testimony as a general rule." Pet. App. 8a-9a.

At the preliminary injunction hearing, INS officials disclosed for the first time that they had compiled lists of individuals who were suspected of being involved in fraud or whose names were suspected of having been fraudulently used by others. These lists, which included the names of hundreds of crewleaders, growers, bookkeepers, immigration agencies and attorneys, were never made part of the record and were never made available to applicants within the administrative review process.[5] Applications submitted

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[5] Respondents admit that the individuals listed were not necessarily involved in fraud at all and that many were legitimate farm labor contractors

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containing these names were subjected to a stricter level of scrutiny than other applications. Indeed, the director of the RPF conceded the existence of a practice under which, if the name of an affiant appeared on the list, the affidavit would not be considered credible and the application would be denied on that basis alone. R. at 2d Supp. Vol. 4, p.88 (testimony of William Chambers). The head of one LO could not recall any instance in which an application was approved where it was accompanied only by an affidavit and involved a name on the list. R. at 1st Supp. Vol. 4, p.47 (testimony of John Adamczyk). Under this practice, applicants were not advised of the existence of these secret lists, nor given any opportunity to correct errors. R. at 1st Supp. Vol. 4, p.121; R. at 2d Supp. Vol. 4, p.92.

The evidence indicated that as a result of these practices and policies adopted for processing SAW applications, the denial rate for SAW applicants filed in the State of Florida was approximately twenty-nine percent (29%), almost six (6) times the denial rate for applications filed for amnesty under IRCA § 245A. Pet. App. 27a at n.9. As a result of these practices and policies documented at the hearing, the district court concluded that "it is difficult to find that the above circumstances constituted a 'meaningful' opportunity to be heard." Pet. App. 51a.

D. The Effect of INS' Practices On Class Members And The Organizational Plaintiffs

The impact of the petitioners' unconstitutional practices both on class members who had not yet filed applications and on those who had was devastating. Father Frank O'Loughlin, Migration and Refugee Services Director for the Diocese of

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who did employ farmworkers during the relevant time period. R. at 1st Supp. Vol. 4, p.35. The list used by the LOs was compiled following a telephone request from the assistant district director to the various LOs for a list of people who were "suspect." No backup documentation exists which supports the inclusion of a name on this list. R. at 1st Supp. Vol. 4, pp.35-36.

Palm Beach, testified that one recent study in Florida on the nutritional status of farmworkers concluded that farmworkers without work authorization "are essentially being starved out . . . " R. at 2d Supp. Vol. 2, p.151. He further testified that:

> [T]he farmworker who is out of work is out of everything. If he is in crew bosses housing, the crew boss has no further use for him. So now he is evicted. Farmworkers are paid on a daily basis or almost a daily basis. They don't have a reserve to fall back on. If they are not getting the daily pay, then they are immediately in financial trouble. Their relationship to their employer is one of utter dependency and powerlessness basically. Once the string is cut, once the crew boss says we don't need you, they have absolutely nowhere to return except back to [the Diocese].

R. at 2d Supp. Vol. 2, p.122. As a result of these practices, the court concluded that class members would suffer irreparable harm "because they will be denied the ability to earn a living and to support their families . . . " Pet. App. 55a.

The organizational plaintiffs, MRS and HRC, were also directly injured as a result of the practices and policies. Pet. App. 11a n.10, 43. MRS, as a designated qualified entity, had entered into an agreement with INS which obligated it to counsel SAW applicants, including providing information regarding supporting documentation requirements and reviewing the application for completeness before transmitting it to INS. For each application accepted by the INS, MRS was to be reimbursed sixteen dollars ($16.00). R, at 2d Supp. Vol. 2, p.138.

Through years of pastoral work among the rural farmworker communities, MRS had built up a reservoir of goodwill and trust. R. at 2d Supp. Vol. 2, p.125. Because of the assumption that many of the alien farmworkers would otherwise be reluctant to come forward and apply for legalization, MRS decided, in the words of Father O'Loughlin, to puts its "credibility at the service of the legalization effort." R. at 2d Supp. Vol. 2, pp.125-26. That credibility was severely damaged when applicants who had been advised by MRS had their

applications rejected because of defendants' practices. R. at 2d Supp. Vol. 2, pp.129-30. Disgruntled applicants, desperate for work authorization, began withdrawing their applications from MRS. R. at 2d Supp. Vol. 2, p.122. Hundreds of other applications were abandoned because of INS' practices. R. at 2d Supp. Vol. 2, p.130.

The challenged INS practices and procedures made the cost of assisting applicants, both in time and money, greatly exceed what had been anticipated at the time MRS had entered into its contract with INS, forcing MRS to divert personnel who were involved in housing, health and literacy programs to the legalization effort. R. at 2d Supp. Vol. 2, p.126. This, in turn, led to internal friction within MRS. R. at 2d Supp. Vol. 2, p.132. The staff and volunteers in one parish became so frustrated with the difficulties in obtaining the type of proof required by the INS that they resigned, thus forcing the office to close. R. at 2d Supp. Vol. 2, p.128; Plaintiffs' Trial Exhibit ("Px") 51.

The Haitian Refugee Center ("HRC") experienced similar problems. HRC is a nonprofit membership corporation organized under the laws of the State of Florida. Its membership consists of Haitian refugees and its main function is to provide its membership with legal representation. R. at 2d Supp. Vol. 2, pp.153-54. The escalating demands of the SAW program produced by the challenged practices and procedure made HRC's work of assisting the Haitian refugee community more difficult and resulted in the diversion of HRC's limited resources away from members and clients having other urgent needs. R. at 2d Supp. Vol. 2, pp.158-60. Neither HRC nor MRS had the resources to assist the denied applicants in filing administrative appeals. R. at 2d Supp. Vol. 2, p.8; R. at 2d Supp. Vol. 2, p.158.

Finding that the lawsuit brought by MRS, HRC and the class, "d[id] not challenge any individual determination of any application for SAW status," Pet. App. 37a-38a, the district court ordered only prospective relief as to the three procedural issues before it. Pet. App. 57a, ¶¶ 6-8. The district court did not reopen or order the reversal of any SAW application which was denied as a result of the lack of translators,

the lack of the record or the refusal of INS to permit witnesses. Pet. App. 56a-57a.

E. The Decision Of The Court Of Appeals

The court of appeals affirmed the preliminary injunction issued by the district court. The court recognized that MRS and HRC had injury in their own right which they sought to remedy in the district court. Pet. App. 11a n.10. The court of appeals concluded that: "[a]ppellees do not challenge the merits of any individual status determinations"; rather, "they contend that Defendants' policies and practices in processing SAW applications deprived them of their statutory and constitutional rights." Pet. App. 11a. The court of appeals specifically noted that "the individual Plaintiffs here do not seek substantive review of any individual ruling respecting their status, rather, they challenge the adequacy of the procedures employed in the processing of their SAW applications." Pet. App. 12a. The court of appeals held that INA § 210 did not deprive district courts of jurisdiction to review allegations of systematic abuses by INS officials, and that such a deprivation not only was not intended by Congress, but "would foster the very delay and procedural redundancy that Congress sought to eliminate." Pet. App. 11a. The court also rejected that government's argument that the plaintiffs had to exhaust their administrative remedies, finding that "the chances are remote that the INS would have considered substantial revision of the procedures devised for the processing of SAW applications at the behest of a single alien mounting a constitutional attack in the context of administrative review of her application." Pet. App. 13a.

SUMMARY OF ARGUMENT

This action was brought by MRS, HRC, and a class of individuals, including persons who had not yet filed applications for SAW status, challenging on constitutional grounds the methods and procedures employed by petitioners to interview SAW applicants. The action did "not challenge the merits of any individual status determination." Pet. App. 12a.

The plaintiffs sought to ensure that the interview process under the program provided for a record that could be reviewed on appeal and that applicants could present witnesses and have their statements accurately translated so that individual review was possible and meaningful.

Petitioners assert that a constitutional challenge of this nature brought in district court is an action seeking "judicial review of a determination respecting an application for adjustment of status" and that district court jurisdiction is therefore barred by 8 U.S.C. § 1160(e), which provides that such review may take place only in the court of appeals and only in the context of the review of a deportation order. Such an interpretation of § 1160(e) is contrary to the statute's language, history and purpose. Moreover, petitioners' approach has repeatedly been rejected by this Court, particularly in cases, like this, where parties have challenged the methods or procedures used by an agency in making its substantive determinations, rather than the substantive determinations themselves. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986) (challenge to the *method* by which such amounts are to be determined rather than the *determinations* themselves); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 779 (1985) (the application of the preclusion statute is problematic when a disability applicant challenges not only the agency's determinations, "but also the standards and procedures used . . . "); *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233, 239 (1968) (Harlan, J., concurring) (assertion by selective service registrant that the procedures pursuant to which he was reclassified were unlawful).

This Court has repeatedly acknowledged "the strong presumption that Congress intends judicial review of administrative action," *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), and that nonreviewability can only be demonstrated by " 'clear and convincing' evidence of a contrary legislative intent. . . . " *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). This presumption is of particular force where a " 'serious constitutional question' . . . would arise if a federal statute were

construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 108 S.Ct. 2047, 2053 (1988).

The plain language of IRCA demonstrates that § 1160(e)'s jurisdictional bar does not apply here. The statute speaks only to the narrow circumstances of a denial of an individual application, referring throughout to "*a determination* respecting an application for adjustment of status," § 1160(e)(1); "review of such *a determination*," § 1160(e)(2)(A); and "the administrative record established at the time of *the determination*," § 1160(e)(2)(B). On its face, § 1160(e) does not apply to organizations such as MRS and HRC who do not seek individual review but applies only to preclude lawsuits that seek judicial review of the fact-finding and law-application functions that determine a specific individual's eligibility or ineligibility for legalization. The present suit, directed at the methods and practices of INS officials, challenges no such "determination" of any particular individual's eligibility for SAW status, and thus does not fall within IRCA's jurisdictional bar.

Not only is the government's construction of § 1160(e) at odds with the statute's clear language, but this construction would frustrate the purpose of the INA. Congress' purpose was to ensure a generous and expeditious program that acknowledged the special problems of alien farmworkers. H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, 83-88 (1986). Congress also provided a special status for community organizations, such as plaintiff organizations, and has accorded many of them – including MRS – the special status of Qualified Designated Entities. *See* 8 U.S.C. §§ 1160(b)(1)(A) and (b)(2). In doing so, Congress recognized the special relationship between community organizations and nonimmigrant aliens, and the need for such organizations to assist applicants in the process. H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, 72-73 (1986). In line with this statutory purpose, the litigation by MRS and HRC challenging INS' unconstitutional methods and procedures in the SAW application process was commenced in order to insure that an adequate record for review was created. Permitting this action, far from frustrating the statutory purpose, effectuates Congress' intent: to insure a generous, expeditious program that would "grant immediate permanent residence to agricultural workers – to benefit the

workers – and to guarantee growers an ample supply of nondomestic agricultural workers – to benefit the growers." 132 Cong. Rec. H8517 (daily ed. Sept. 26, 1986) (Statement of Rep. Mazzoli).

The legislative history of the INA clearly shows that Congress rejected a restrictive judicial review provision contained in a prior Senate version, which would have precluded jurisdiction in a case such as this, and instead adopted the more limited preclusion provision contained in the House provision. See *infra*, pages 46-47. Congress' final choice of language clearly demonstrates that it intended to preserve federal jurisdiction over cases such as this one while at the same time addressing the problem of delays occasioned by piecemeal review of individual determinations. By contrast, the government's interpretation of § 1160(e) would: (1) delay immeasurably, if not preclude entirely, resolution of claims that the agency is systematically and unfairly obstructing the ends sought to be achieved by the SAW program; and (2) require the federal courts of appeal to address on a case-by-case basis claims that can efficiently and adequately be resolved only in the forum of a trial court capable of creating an appropriate record.

The petitioners' broad preclusion argument also raises "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 108 S.Ct. 2047, 2053 (1988). Plaintiffs' constitutional claims, as petitioners concede, may not be addressed at the administrative level. Pet. Br. at 18 n.14. *See also, Califano v. Sanders*, 430 U.S. 99, 109 (1977). Similarly, plaintiffs' right to obtain adequate review of its constitutional claims in the court of appeals under the statutory scheme is wholly dependent upon INS' choosing to place an applicant in deportation proceedings. Because the SAW statute provides a wall of confidentiality between farmworkers whose applications are denied and the INS, 8 U.S.C. § 1160(b)(6), the applicant may obtain judicial review of his application only if INS apprehends him based on evidence derived from a source independent of his SAW application or if he comes forward *and* INS, *within its*

unreviewable discretion, chooses to place the applicant in a deportation proceeding.

A serious constitutional question is thus raised for four separate reasons. First, petitioners' interpretation would deny to organizations such as HRC and MRS any opportunity to redress the direct harm caused to them by the government's unconstitutional policies. *Bowen*, 476 U.S. at 681 n.12. Second, the alien must subject himself to arrest and deportation and forego his statutory right to confidentiality under the SAW program in order to be eligible to obtain judicial review. *See Rusk v. Cort*, 369 U.S. 367, 375 (1962) (finding federal jurisdiction notwithstanding a separate review provision for challenging loss of citizenship where a person, to utilize the statute, "must travel thousands of miles, be arrested and go to jail"). Third, even where the alien takes such steps, review is wholly within the discretion of an executive officer. *See United States v. Nourse*, 31 U.S. (9 Pet.) 8, 28-29 (1835). Finally, even if the applicant is able to obtain review in the court of appeals, 8 U.S.C. § 1160(e) precludes that court from developing an adequate factual record, preventing it from being a competent forum to address the applicant's constitutional claims. *Cf. Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233, 243 (1968) (Harlan, J., concurring); *Johnson v. Robison*, 415 U.S. 361, 367-74 (1974).

ARGUMENT

I. THERE IS A STRONG PRESUMPTION OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, PARTICULARLY WHEN CONSTITUTIONAL CLAIMS ARE INVOLVED

This Court has repeatedly acknowledged "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). *See also, Traynor v. Turnage*, 108 S.Ct. 1372, 1378 (1988); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778 (1985); *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Barlow v. Collins*, 397

U.S. 159, 166-67 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). This presumption not only originates in the Administrative Procedures Act, *Abbott Laboratories*, 387 U.S. at 140, but in the very foundation of the Court's power to maintain judicial review. *Bowen*, 476 U.S. at 670 (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) and *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835)).

This Court has noted that judicial review of administrative actions "is the rule, and nonreviewability an exception which must be demonstrated," *Barlow v. Collins*, 397 U.S. at 166-67, and that nonreviewability can only be demonstrated by "clear and convincing evidence of a contrary legislative intent." *Abbott Laboratories*, 387 U.S. at 141; *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946), U.S. Code Cong. Serv. 1946, P. 1195.

Moreover, this Court has also repeatedly acknowledged that " '[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.' " *Lindahl*, 470 U.S. at 782 (*citing Abbott Laboratories*, 387 U.S. at 141).

The strong presumption favoring judicial review is of particular force in cases raising constitutional questions where divesting the Court of jurisdiction to review an administrative action would create "the 'serious constitutional question' that would arise if a federal statute were to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 108 S.Ct. 2047, 2053 (1988). *See also, Bowen*, 476 U.S. at 681 n.12; *Johnson v. Robison*, 415 U.S. 361, 367-74 (1974); *Oestereich v. Selective Service Systems Local Board No. 11*, 393 U.S. 233, 237-38 (1968).

Thus, even where statutes on their face bar judicial review of agency action, this Court has interpreted them to permit review of *constitutional* claims. *E.g., Johnson*, 415 U.S. at 367-73 (noting that if veterans' benefits statutes were interpreted to bar judicial review of constitutional challenges, it would "raise serious questions concerning [its] constitutionality," and finding an exception for judicial review of constitutional claims). *Weinberger v. Salfi*, 422 U.S. 749

(1975); *Oestereich*, 393 U.S. at 237-38; *id.* at 240-43 (Harlan J., concurring); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955); *Estep v. United States*, 327 U.S. 114, 120-23 (1946); *id.* at 128 (Murphy, J. concurring); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 334-37 (1932).

The petitioners' broad reading of the administrative and judicial review provision of the SAW statute ignores the strong presumption favoring judicial review and reads the statute in a manner inconsistent with its language, its structure and purpose, its legislative history and the nature of the action before this Court. Although the presumption favoring judicial review can be overcome in appropriate circumstances, those circumstances are not present here. The language of 8 U.S.C. § 1160(e) purports to restrict administrative and judicial review only for nonorganizational, individual applicants who seek review of a denial of their SAW application on a completed record on appeal. The purpose of the statute would be enhanced by permitting a constitutional challenge in the district court concerning INS' practices and procedures; indeed, the legislative history supports jurisdiction in such an action which would enhance and expedite the review process. As the objective of respondents' action was to permit a full record to be developed for purposes of review, district court action is fully consistent with the statutory scheme.

II. PETITIONERS HAVE NOT OVERCOME THE PRESUMPTION IN FAVOR OF JUDICIAL REVIEW IN THIS CASE

Respondent organizations MRS and HRC, and class members, including a class of persons who have not yet filed applications under the SAW program, brought this action to challenge the methods and procedures that were used by INS to establish a record for administrative and judicial review. This case "d[id] not challenge any individual determination of any application for SAW status . . . " Pet. App. 37a-38a. The substantive changes ordered by the district court (paragraphs 6, 7 and 8 of the district court's order) are not challenged by

the petitioners here, and this relief did not effect a single SAW application that had been denied because it was prospective only. Pet. App. 57a.

A. Section 1160(e) Cannot Be Read To Preclude Constitutional Challenges To INS Conduct By Organizational Plaintiffs

On its face, § 1160(e) simply does not apply to organizations such as MRS and HRC. The statutory language is limited to review of individual applications filed by SAW applicants. Indeed, petitioners admit that organizations such as MRS and HRC "of course, cannot themselves obtain review of the operation of the SAW program by raising claims on review of an order of deportation or exclusion." Pet. Br. at 23.

Because the organizational plaintiffs do not seek review of any individual determination, but rather the method in which the determinations were made, this case is controlled by *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). In *Bowen*, an organization of family physicians and several individual physicians filed suit in district court challenging a PHS regulation authorizing the payment of Medicare Part B benefits in different amounts for similar physicians' services. The government made exactly the same argument there that it makes here, contending that the Medicare Act impliedly foreclosed judicial review of any action taken under Part B because it failed to authorize such review while simultaneously authorizing judicial review of "any determination . . . as to . . . the amount of benefits under Part A." *Bowen*, 476 U.S. at 673. This Court rejected the government's arguments in *Bowen*, holding that the district court had jurisdiction over the plaintiffs' challenge to the reimbursement regulation. This Court reasoned that the provisions detailing how and in what forum an individual could obtain review of a determination as to the amount of benefits "simply [do] not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." 476 U.S. at 675 (emphasis in original). The Court distinguished *Heckler v. Ringer*, 466 U.S.

602 (1984), the case heavily relied upon by petitioners here, as a case seeking review of an amount determination. *Id.* at 677-78 n.7.[6] Because this case does not seek review of the denial of any application for SAW status, *Heckler* is similarly distinguishable here.

In *UAW v. Brock*, 477 U.S. 274 (1986), the UAW and several of its members challenged the Secretary of Labor's interpretation of the benefit eligibility provisions of the Trade Act of 1974. This Court similarly rejected the Secretary's contention that the restrictions on judicial review of individual benefit determinations deprived the district courts of jurisdiction in any case where an individual benefit determination would be affected:

> The Secretary's arguments simply miss the point of petitioner's claims. The statutory challenges raised

[6] The distinction between *Heckler v. Ringer* and the present case is obvious. In *Ringer*, the Court held that Ringer's cause of action – namely, that the Secretary's ruling barring reimbursement for a certain medical procedure was invalid under the Medicare Act – constituted "a claim arising under" the Medicare Act within the meaning of the judicial preclusion provision. 466 U.S. at 621. Unlike the Medicare Act, IRCA nowhere attempts to define and prescribe the method of review for all "claims arising under the Act." Far from providing an analogy for how IRCA should be construed, the broad terminology employed in 42 U.S.C. § 405(h), expressly providing that no action shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under [subchapter A] of the Medicare Act, illustrates that Congress knows how to draft a comprehensive jurisdiction-preclusion provision when it wants to.

Bowen was originally remanded to the lower court for further reconsideration in light of *Heckler v. Ringer*, 466 U.S. 602 (1984). *See*, 469 U.S. 807 (1984). On remand, the court of appeals specifically addressed the question of whether the Michigan Academy of Family Physicians, a nonprofit corporation, was entitled to challenge a Medicare regulation in district courts since § 405(g) administrative review was not available to it, as it was to individual claimants. The court of appeals concluded that *Ringer* did not proscribe challenges to the Medicare Act where the challenge was made by a party other than a claimant for benefits. *Michigan Academy of Family Physicians v. Blue Cross and Blue Shield of Michigan*, 757 F.2d 91, 94 (6th Cir. 1985). The decision was subsequently affirmed by this Court. 476 U.S. 667, 669 (1986).

> here will no doubt affect the outcome of individual entitlement determinations if petitioners are successful on the merits of their suit. However, this action does not directly seek . . . [individual] benefits.

477 U.S. at 284.[7] Similarly, this case does not seek "reversal of INS' denials of SAW applications in particular cases," as petitioners argue. Unlike the situation in *Ringer* where the claims of the plaintiffs, although couched in procedural language, were "at bottom, a claim they should be paid for their BCBR surgery," the injunctive relief ordered by the district court at issue here does not dictate the outcome of any

[7] Petitioners attempt to distinguish *UAW v. Brock* on two grounds. First, they argue that *Brock* does not apply because the plaintiffs there were seeking review of *federal* guidelines and the statute only confined judicial review of *state* agency determination to the state courts. Significantly, *Brock* rejected the same argument echoed here by petitioners – that the limitation on review of "*a determination* . . . with respect to entitlement to program benefits" contained in § 2311(d) "irrevocably commits to state processes *all claims* relating to TRA entitlements." *Brock* at 284 (emphasis added). That rejection did not rest on the division of responsibilities between different agencies, as suggested by petitioners, but on the longstanding principle that "although review of individual eligibility determinations in certain benefits programs may be confined by state and federal law to state administrative and judicial processes, claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court." *Id.* at 285 (*citing Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977); *Fusari v. Steinberg*, 419 U.S. 379 (1975); *California Dept. of Human Resources v. Java*, 402 U.S. 121 (1971); and *Christian v. New York State Dept. of Labor*, 414 U.S. 614 (1974)). For example, in *Christian*, the Court again drew the crucial distinction between review of individual determinations and review of the policies upon which such determinations are made: "the fact that the employing agency's decision is not statutorily subject to judicial review does not preclude review of the agency's procedures used to reach that determination." *Id.* at 622. Petitioners also argue that the holding in *Brock* was "necessary to assure some federal forum for initial review of the Department of Labor's substantive rules," but that "district court jurisdiction is not needed for that purpose under IRCA." *Brock*, however, does not say anything about the necessity for initial review of substantive rules, nor do petitioners ever explain how one could obtain an "initial" review of INS rules under their interpretation of § 1160(e).

particular case. Because INS must provide competent translation or accurately record what is said by the applicant at the interview, it is not thereby obliged to rule in the applicant's favor.[8]

B. To Deny District Court Jurisdiction In This Case Would Effectively Foreclose Any Meaningful Review Of Constitutional Violations Which Are Uncontested By Petitioners In This Court

This case comes before this Court upon the unchallenged finding by the district court that respondents were irreparably harmed by the constitutional violations alleged. Pet. App. 53a. Noting that the opportunity to apply for legalization was of limited duration, the district court was unable to find that *any* monetary remedy would compensate for the loss of benefits afforded by U.S. residency. *Cf. Agosto v. INS*, 436 U.S. 748, 754 (1978) (*citing Ng Fung Ho v. White*, 259 U.S. 276 (1922) (deportation may result in loss "of all that makes life worth living")). The district court also found that the deprivation of work authorization for persons who lead the marginal existence of farmworkers also constituted irreparable harm. Pet. App. 55a. Petitioners do not contest those findings here.

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[8] Contrary to the implication of petitioners' grandiose claim that the relief granted by the district court "makes manifest that the complaint's purpose was to achieve, on a mass scale, review and reversal of INS' denials of SAW applications in particular cases," the district court did not order that class members be granted SAW status. Nor did its order in any way interfere with the INS' role as the ultimate determiner of eligibility under the statute and regulations. Indeed, "at the administrative level, the District Court showed proper respect for the administrative process." *Bowen v. City of New York*, 476 U.S. 467, 485 (1986) (upholding order requiring reopening of more than 50,000 social security cases). While petitioners profess to be very concerned about the inconvenience of having to reopen the 20,000 cases which were denied under improper procedures, paradoxically they have chosen not to appeal those provisions of the preliminary injunction which required them to reopen the cases. Instead, the only provisions of the district court's order at issue here are paragraphs 6, 7 and 8 which are wholly prospective in nature, and thus could not possibly have affected any prior determination respecting a SAW application.

The respondents' successful constitutional challenges to INS' procedures and policies could not, in effect, have been raised through the review process described in § 1160(e). As a result, the government's position that respondents were limited to that process creates "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 108 S.Ct. 2047, 2053 (1988). Respondents were prevented from raising their constitutional claims through the § 1160(e) review process for four reasons. First, organizational plaintiffs are not afforded the review process to redress their own injuries arising out of INS' constitutional violations. Second, the individual applicant must subject himself to arrest and possible deportation in order to be eligible to obtain judicial review of his claim. Third, judicial review is wholly dependent upon the discretion of INS officers who must choose to initiate a deportation process in order for review to occur. Fourth, even if an applicant could appeal to the circuit court, that court, lacking an adequate factual record, is prevented from being a competent forum to address the applicant's constitutional claims.

1. Section 1160(e)'s review process does not permit respondents to effectively raise their constitutional claims.

While conceding that the LAU lacked the authority to address the constitutional claims of MRS, HRC and class members, Pet. Br. at 23 and 18 n.14,[9] petitioners insist that at

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[9] The petitioners acknowledge that *Califano v. Sanders*, 430 U.S. 99, 109 (1977) precludes constitutional review of class members claims in the administrative forum. In *Califano*, this Court noted that: "[c]onstitutional questions are unsuited to resolution in administrative hearing procedures and, therefore, access to courts is essential to the decision of such questions." Although petitioners argue that the LAU "could be urged to afford commensurate relief on statutory grounds," Pet. Br. at 18 n.14, this claim ignores the fact that the right to a translator, to a completed I-696, or to present witnesses at a SAW interview were not based upon any statutory right under IRCA or

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least class members could obtain judicial review of these claims. Pet. Br. at 18.[10] This assertion is illusory for several reasons.

First, class members would have to subject themselves to arrest and deportation in order to be eligible to obtain review. Under § 1160(e), a farmworker whose SAW application has been denied can only obtain review of that application if he is in a deportation or exclusion hearing. *Noriega-Sandoval v. U.S. INS*, ___ F.2d ___ (9th Cir. Aug. 13, 1990). Because the confidentiality provision of the SAW statute, 8 U.S.C. § 1160(b)(6), prevents INS from using any information from the SAW application as a basis to institute deportation proceedings, those proceedings can only be brought if INS obtained evidence from an independent source that the applicant was illegally in the United States. A class member, therefore, could only be eligible to obtain judicial review of his constitutional claims if he presented himself to INS, subjected himself to arrest and sought to have a final deportation order entered against him. This process poses potentially serious problems for class members who are not deportable because they entered the United States under the H-2A temporary agricultural worker program, 8 U.S.C. § 1101(a)(15)(H)(ii)(A), and maintained their lawful status, and for farmworkers who are outside of the United States at

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the INA, but rather, were constitutionally derived. Indeed, in the appellate court – the very court in which individual applicants would have sought review – the petitioners, including the Attorney General, argued that these claims could not be derived from the INA or IRCA. Appellants' Reply Brief at 12-19 (arguing that "the statute, the regulations and due process do not require the Immigration and Naturalization Service to provide a translator at interviews with SAW applicants, to give SAW applicants the right to call witnesses at such interviews, or to prepare a written statement particularizing the evidence offered, testimony taken, and credibility determination made").

[10] Petitioners concede that the organizational plaintiffs could not raise constitutional claims to the circuit court of appeals through § 1160(e). Pet. Br. at 23.

the time of their denial. Requiring farmworkers to be subjected to deportation when they may not be deportable or to submit to arrest and deportation simply to obtain review under § 1160(e), would pose "the serious constitutional question" that denying independent review raises. *Rusk v. Cort*, 369 U.S. 367 (1962). *See also*, Kanstroom, *Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives To Get Into Court?*, 25 Harv. C.R.-C.L. L. Rev. 53 (1990).

In *Rusk*, this Court granted independent federal review to a person contesting his loss of citizenship notwithstanding the review procedures set out in 8 U.S.C. § 1503(b) and (c). Because these latter provisions required a person living abroad to "travel thousands of miles, be arrested and go to jail in order to attack an administrative finding that he is not a citizen," 369 U.S. at 376, this Court found that the provisions did not preclude the broad remedial provisions of the APA.

An equally serious constitutional question posed by denying judicial review of applicants' constitutional claims except through § 1160(e) is that the decision to permit review functionally is given solely to the INS. Even if the farmworker presents himself for arrest and deportation solely to obtain review of his constitutional claims, INS may refuse, in its unfettered and unreviewable discretion, to institute deportation proceedings that under the statute, is a prerequisite to review.[11]

Under petitioners' theory, the district director, who alone may invoke deportation proceedings, would have the ultimate power to place INS altogether beyond the constraints of

[11] Nothing in the INA or its regulations provides a way for an alien to trigger the initiation of deportation proceedings against himself. Generally, every proceeding to determine the deportability of an alien is commenced by the filing of an order to show cause with the Office of the Immigration Judge. *See*, 8 C.F.R. § 242.1 (providing for the issuance of an order to show cause by one of a list of enumerated officials). The decision to institute deportation proceedings involves the exercise of prosecutorial discretion and is not reviewed by either the immigration judge or the BIA. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Merced*, 14 I&N Dec. 644 (BIA 1974); *Lopez-Telles v. INS*, 564 F.2d 1302 (9th Cir. 1977).

judicial review, no matter how facially unconstitutional its actions may be, simply by choosing not to institute deportation proceedings against those affected. Petitioners' argument runs against the grain of the most fundamental tenets of our constitutional system: the separation of powers; the notion of a government of laws, not of men; and most importantly, the role of judicial review in protecting individuals' constitutional rights against abuses of government authority.[12]

The petitioners' ability to control when and if respondent class members could obtain constitutional review would place the marginal farmworkers involved here in the untenable position of continuing to suffer irreparable harm by being "denied the ability to earn a living and to support themselves." Pet. App. 55a.[13] This is precisely what would happen to class members whose applications were improperly denied on the basis that they were frivolous, were they to be required to await a decision to place them in deportation proceedings in order to raise their constitutional claims. Even a farmworker who desired being placed in a deportation proceeding to obtain judicial review would have to suffer irreparable harm for months or years, if not indefinitely.[14] Although the

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[12] *See United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835), where Chief Justice Marshall wrote: "It would excite some surprise if, in a government of laws and principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to the debtor no remedy, no appeal to the laws of this country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the Legislature of the United States."

[13] Under the SAW legislation, an applicant presenting a nonfrivolous claim is entitled to work authorization until a final determination is made in his case. 8 U.S.C. § 1160(d)(2). The denial of work authorization in this context is a denial of liberty and property interests. *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Examining Board v. Flores de Otero*, 426 U.S. 572, 604 (1976) (*citing Truax v. Raich*, 239 U.S. 33, 41 (1915)); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

[14] For example, under petitioners' analysis, the district director could interpret IRCA to apply to only male (or European, or brown-eyed) aliens,

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SAW program ended in November, 1988, no reported decision from a denial of SAW status in the context of review of an order of deportation or exclusion has yet to reach the circuit court of appeals.[15]

2. The restrictive review provisions of § 1160(e) prevent constitutional challenges to a deficient administrative record.

Not only is such "conditional" review totally inadequate, but substantial doubt also exists concerning whether the courts of appeal are fully competent to adjudicate respondents' constitutional claims under the restrictive review procedures established by the statute. Both administrative appellate review and circuit court review are restricted under the statute to "the record established at the time of the determination on the application and upon such additional or newly discovered evidence as may have been available at the time of the determination." § 1160(e)(2)(B); cf. § 1160(e)(3)(B). The various regulations circumscribing the record that can be made at the administrative level and the scope of authority of the LO, RPF and LAU reveal that there is no point during the process when an applicant can make an

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deny legalization to all others, and be immune from any challenge in the courts until (1) those aliens who had spent the time and money to apply despite the policy disqualifying them had received final denials of legalizations; (2) these aliens at some subsequent point in time found themselves arrested and taken into custody by the INS; (3) put into deportation proceedings; (4) lost their deportation hearings; (5) appealed to the BIA; (6) lost their appeal to the BIA; and (7) appealed their final orders of deportation to the court of appeals. Persons not subsequently placed in deportation proceedings could never, under petitioners' view, challenge such a blatantly illegal policy.

[15] Because § 1160(e) provides no time frame to obtain judicial review, *Yakus v. United States*, 321 U.S. 414 (1944) is not relevant. This Court in *Yakus* found that the expedited procedure to challenge a decision by the wartime Price Administrator followed by review in an Emergency Court of Appeal provided a reasonable opportunity to be heard and an applicant did not have to subject himself to penalties prior to obtaining review.

appropriate record for the court of appeals or have the relevant legal issues adjudicated and preserved for review. To withhold district court review in this case would thus deprive respondents of their liberty interest in SAW status without the opportunity to present to *any* competent forum – agency or court – their substantial claim that they were denied pursuant to unlawful procedures involving the creation of the record. Such an interpretation of § 1160(e) would raise a serious constitutional problem.[16]

Moreover, a challenge to the validity of the administrative procedure itself presents an issue beyond the competence of the INS to hear and determine. Where, as here, the administrative violations alleged go directly to the integrity of the record, review based on the record as established by the agency would be an exercise in futility.

The crux of respondents' constitutional claim is that they have been denied "a meaningful opportunity to be heard." *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). When their words or the words of witnesses in their behalf are not preserved for the record, or are not properly translated, they

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[16] Cf. *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233, 243 (1968) (Harlan, J., concurring). In *Oestereich*, a selective service registrant brought a pre-induction action challenging the lawfulness of the procedure by which he was reclassified and ordered to report for induction despite a provision of the Selective Service Act which provided that "[N]o judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the registrant has responded . . . to an order to report for induction . . . " Justice Harlan, though concurring in the court's opinion that pre-induction review was available, offered a different analysis than that of the majority. Noting first that "[i]t is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims," he then found that the options of defending a criminal prosecution or filing a petition for habeas corpus after induction would not provide meaningful review. *Id.* at 243 n.6. In order to avoid the constitutional problems that were thus presented, Justice Harlan read the preclusion statute not to prohibit review of claims of procedural irregularity, but only review of factual and discretionary decisions inherent in the classification of registrants. *Id.* at 241-43. *See also, Estep v. United States*, 327 U.S. 114, 129-30 (1946) (concurring opinion of Mr. Justice Murphy). The same considerations dictate a similar approach here.

have not been "heard." Any attempt to raise this claim before the LAU would similarly be futile because that body is restricted by the statute to examining only "the administrative record established at the time of the determination of the application" and any "additional or newly discovered evidence as may not have been available at the time of the determination." 8 U.S.C. § 1160(e)(2)(B). The "record established at the time of the determination" would normally consist of the application, supporting documents, and the interviewer's notes on the I-696, if any. If the interviewers did not transcribe what the applicant said at the interview, or as testimony at trial indicated, did not note that a translator was used or indicate that translator's qualifications, then the only way in which the applicant could raise those issues at the appellate level would be by introducing evidence outside of the record as to what transpired at the interview, which the statute specifically forbids.[17] The same difficulty would be presented at the judicial level, where review again is based "solely upon the administrative record established at the time of review by the appellate authority." 8 U.S.C. § 1160(e)(3)(B). The findings of fact and determinations contained "*in such record*" are made conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained *in the record* considered as a whole. *Id.* If the record of the interview is incomplete or totally lacking, presumption in favor of the agency's findings could never be overcome. As the court of appeals noted, "[w]ithout any record of what transpired at the interview . . . the review provided for in IRCA is meaningless." Pet. App. 16a, *citing Kent v. United States*, 383 U.S. 541, 561 (1966) ("meaningful review requires that the reviewing court should review").

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[17] As noted previously, petitioners' regulations do not permit applicants to file motions to reopen. 8 C.F.R. § 103.5. Nor does it seem likely that evidence regarding what occurred at the interview could be characterized as "additional or newly described evidence as may not have been available at the time of the determination."

3. The court of appeals is not a competent forum to address respondents' constitutional claims in the first instance.

Even if respondents could have made an objection on due process grounds during the course of review proceedings under § 1160(e), there is no way they could have raised their constitutional claims on the record so as to secure meaningful judicial review from the circuit court. Under the three-part test established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in order to determine what process is due in the administrative context, courts must determine first "the private interest that will be affected by the official action, second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *See also, Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (*Mathews* test appropriate for evaluation of procedures in immigration context). These considerations are simply beyond the scope of administrative review and the underlying facts on which such an analysis must rest are not readily ascertainable in the context of an individual applicant's case.[18]

The courts of appeal have no way to independently develop a factual record on these issues,[19] and it is well

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[18] For example, even were the circuit court to reach the issue of whether due process required that competent translation be provided, it is very unlikely that it could determine from the record of the individual case what percentage of applicants required translation, what languages were typically spoken, what were the existing language capabilities of the INS staff, and whether competent translators in the key languages were readily available. These matters were only ascertained through discovery and at the preliminary injunction hearing in this case.

[19] Much of the information needed to establish a *Mathews* analysis is exclusively within the control of the government and could not be obtained by an applicant without resorting to the discovery devices allowed under the Federal Rules. The absence of any opportunity to examine INS officials under oath also frustrates any review of constitutional violations within the context

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established that a deficient factual record cannot be remedied in the court of appeals. *Congress and Empire Spring Co. v. Knowlton*, 103 U.S. 49 (1881); *Hefner v. New Orleans Public Service, Inc.*, 605 F.2d 893 (5th Cir. 1979); 4A C.J.S. Appeal and Error § 1206. Moreover, it would be most anomalous to conclude that circuit courts could remand SAW cases back to the BIA or the immigration judge for a final hearing on factual matters that they lacked authority to hear in the first place. For precisely this reason, a substantial doubt exists concerning whether respondents' claims could ever be raised in the court of appeals, particularly since that court's jurisdiction is specifically limited to reviewing the administrative record established at the time of review by the appellate authority.[20]

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of the administrative process established by petitioners. In the present case, the use of the lists of "suspect" affiants to deny applicants was only brought out at the hearing on the preliminary injunction. There was no way that an individual applicant would have been in a position to contest the use of such lists in the context of an individual appeal.

These problems are highlighted by petitioners' contention that permitting district court review "breeds confusion about the appropriate record and standard of review." The contrast between the record of an individual case (see, e.g., the legalization file of respondent Jean-Phillipe Marie France, Px. 54, J.A. 63) and the record of this case is striking. Petitioners' statement, that "[t]here is no ready way for district courts to apply [the standard for review at 8 U.S.C. § 1160(e)(3)(B)] in broad class actions addressing generalized issues divorced from the circumstances of a particular case" only underscores the fact that a review of an individual determination is utterly dissimilar from a constitutional challenge to illegal across-the-board agency action, and that the highly restrictive standard at § 1160(e)(3)(B) was intended to apply only to the review of individual cases and not to constitutional review which applies a *de novo* standard.

[20] In the analogous situation, where petitions have raised constitutional or other claims requiring a factual hearing in review of a § 242(b) deportation proceeding, the courts have held that they lack jurisdiction to review a "recordless decision" and that petitioners must bring an original action in the district court. *See, e.g., Olaniyan v. District Director, INS*, 796 F.2d 373 (10th Cir. 1986); *Mohammadi-Motlagh v. INS*, 727 F.2d 1450 (9th Cir. 1984); *Ghorbani v. INS*, 686 F.2d 784 (9th Cir. 1982); *Abedi-Tajrishi v. INS*, 752 F.2d 441 (9th Cir. 1985). *See also, Dastmalchi v. INS*, 660 F.2d 880 (3d Cir. 1981); *Tooloee v. INS*, 722 F.2d 1434, 1437 (9th Cir. 1983).

In the final analysis, the prospect of judicial review in the court of appeals held out by the petitioners is illusory.[21] To deny review in the district court would be to deny review altogether of respondents' colorable constitutional claims. Petitioners can point to nothing in either the language of the statute or in its legislative history which clearly reveals an affirmative intention on the part of Congress that such review be unavailable.

C. The Language of § 1160(e) Mandates Rejection Of Petitioners' Argument That The District Courts Lack Jurisdiction To Review Any Aspect Of The SAW Program

The actions by INS which form the basis for respondents' complaint were not routine decisions of individual adjudicators with respect to the merits of particular applications. Instead, they are more akin to the "wholesale, carefully

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[21] The only circuit court cases thus far which address the review of individual legalization applications are not to the contrary. In *Martinez-Montoya v. INS*, 904 F.2d 1018 (5th Cir. 1990), the court set aside a denial by the LAU because the INS had applied the wrong legal standard in concluding the applicant had been convicted of a crime. Only a question of law was presented. In *Farrokhi v. U.S. INS*, 900 F.2d 697 (4th Cir. 1990), an alien attempted to raise his possible entitlement to legalization as a defense in deportation proceedings. Since there had been no final judgment on his legalization application at the time of his appeal from the BIA decision, the circuit court found that there were no facts by which the court could review his application consistent with the statutory requirements of deference to the appellate administrative record. Most recently, in *Noriega-Sandoval v. U.S. INS*, ___ F.2d ___ (9th Cir. Aug. 13, 1990), the Ninth Circuit held that it lacked jurisdiction to review the LAU's denial of an application for legalization under IRCA except in the context of a review of an order of deportation. Finding that the plain language of the statute "clearly expresses Congress' intent to permit *appellate* review of *denials* of adjustment solely within the context of our review of orders of deportation," the court distinguished its holding from the question presented here: "[t]he jurisdictional question raised here concerns the merits of an individual application. For this reason, this case is dissimilar to the class or group challenge concerning executive branch compliance with immigration law which was presented in *Haitian Refugee Center v. Nelson*, 872 F.2d 1555 (11th Cir. 1989) . . . "

orchestrated, program of constitutional violations" alleged in *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982). The case involved here challenged INS policies and procedures of relying on secret lists of "suspect" affiants, denying applicants the opportunity to hear and rebut adverse evidence, denying applicants the right to translators necessary to adequately present their cases, and depriving them of their right to present witnesses and to have an accurate record of proceedings. These challenged actions all reflect decisions made by those in charge of the overall administration of the program, not individual determinations in particular cases. Such policy decisions of general applicability by high level administrators can in no way be considered "determination[s] respecting an application" and therefore, the jurisdictional limitation at 8 U.S.C. § 1160(e) simply does not apply in this case.

Petitioners attempt to circumvent the limiting language of § 1160(e) by arguing that "a determination respecting an application" includes any policy or practice that might affect the outcome of a class of individual applications, as well as determinations made in individual cases. The plain language of the statute does not support that expansive reading.

The entire subsection dealing with administrative and judicial review under § 1160(e)(1) makes clear that Congress used the phrase "a determination respecting an application" to refer to a specific determination of a specific individual application, i.e., ascertaining the facts of an individual's application for SAW status and applying the law to those facts. The words "application for adjustment of status" refer to a written document submitted by an individual applicant. 8 U.S.C. § 1160(b). This application is a specific document which "may be filed" with the Attorney General or a QDE. *Id.* The INA requires the Attorney General to establish "a single level of administrative appellate review of such *a determination*." § 1160(e)(2)(A) (emphasis added). Such review "shall be based solely upon the administrative record established at the time of the *determination on the application*" and upon newly discovered evidence that was unavailable "at the time of *the determination*." § 1160(e)(2)(B) (emphasis added).

That the term "determination *respecting* an application" is restricted to the consideration of a particular applicant's case is further defined by the use of the word "denial" *in the same subsection of the Act* providing for judicial review under 8 U.S.C. § 1105a:

> There shall be judicial review of *such a denial* only in the judicial review of an order of exclusion or deportation under Section 1105a of this title.

8 U.S.C § 1160(e)(3) (emphasis added).

Thus, read as a whole, the paragraph limits judicial review of the denial of a SAW application. Where no *denial* of a particular *application* is sought to be reviewed, the district court's general federal question jurisdiction under 28 U.S.C § 1331 and specific statutory jurisdiction under 8 U.S.C. § 1329 remain unimpaired. The reference to "a denial" and the use of the modifier "such" make clear that only a final determination of an individual application is subject to the limitation on review, *not* the "determinations" of the district director or the director of the RPF as to broad policies or practices applicable to all cases. For this reason, organizational plaintiffs MRS and HRC and class members who had not yet filed applications could not be said to be seeking a review of "a determination respecting an application."

If Congress had wished to limit review in the manner in which petitioners suggest, it could easily have restricted review of "any claim arising under" the statute, as in *Heckler v. Ringer*, 466 U.S. 602, 615 (1984), or of "any action taken or decision made with respect to" the SAW program. However, § 1160(e) is addressed only to "*a determination* respecting *an application*." 8 U.S.C. § 1160(e) (emphasis added).

The petitioners' analysis of the language of § 1160(e) would also implicitly repeal 8 U.S.C. § 1329, despite congressional intent to the contrary. The immigration jurisdictional statute, § 1329, has a broad sweep that includes "all causes, civil and criminal, arising under any of the provisions of [] Title [II]" of the INA.[22] This statute predates § 1160(e) and

[22] Similar language in *Heckler v. Ringer*, 466 U.S. 602 (1984) was found to have a broad sweep encompassing all claims.

was the jurisdictional basis for lawsuits challenging INS' improper practices and procedures. *See Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982); *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *aff'd on other issues as to judgment only*, 472 U.S. 846 (1985). Prior to the enactment of § 1160(e), there is direct evidence that Congress knew of and endorsed procedural and policy challenges, such as those here, under 8 U.S.C. § 1329.[23] Jurisdiction was permitted, notwithstanding the bar to judicial review under 8 U.S.C. § 1105a. The relevance of this matter is that § 1160(e) incorporated 8 U.S.C. § 1105a when it provided that the judicial review of a SAW denial could only occur in "the review of an order of exclusion or deportation under Section 1105a." § 1160(e)(3)(A). Congress, of course, is presumed to have knowledge of the interpretation given to the incorporated law, *Lindahl v. Office of Personnel Management*, 470

[23] In 1983, when the Senate was debating judicial review of asylum applications as part of an immigration reform bill, the following colloquy occurred regarding a provision which would make the provisions of chapter 158 or title 28 the sole and exclusive procedure for the judicial review of final orders of exclusion or deportation, notwithstanding 8 U.S.C § 1329 and 28 U.S.C. § 1331:

> MR. BIDEN: [W]ith regard to section 123(a)(2), my understanding is that the language in that section is intended to make clear that it establishes the sole basis for reviewing final orders of deportation or exclusion. There is no intention to overturn any cases providing for judicial review, other than final orders, in matters of pattern and practice when that is appropriate or in the following cases:
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> *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982).
>
> *Louis v. Nelson*, No. 82-5772 (11th Cir. dec. Apr. 12, 1983).
>
> *Orantes-Hernandez v. Smith*, 541 F.Supp. 351 (C.D. Ca. 1982).
>
> Is my understanding correct?
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> MR. SIMPSON: Yes, Mr. President. The reference to section 279 of the Act and to section 1331 of title 28 is simply to make clear that they do not provide a basis for district court review of final orders.

129 Cong. Rec. 12,857 (May 18, 1983).

U.S. 768, 782 n.15 (1985), and to adopt the interpretation when it incorporates the prior law without change. *Id.*[24]

Here, the language of § 1160(e) does not specifically preclude judicial review of cases including procedural and policy challenges under 8 U.S.C. § 1329, notwithstanding the incorporation of § 1105a, where prior decisions support jurisdiction in the district court over the type of suit brought here.

Moreover, direct evidence of Congress' knowledge of the interpretation given § 1329 exists. Indeed, one of the sponsors of the IRCA legislation, Senator Simpson, participated in the colloquy recognizing the reach of 8 U.S.C. § 1329. Notwithstanding that knowledge, the farmworker legalization provisions, including § 1160(e), were placed within Title II of the INA and come within the broad sweep of 8 U.S.C. § 1329 addressing "all causes, civil or criminal, arising under any of the provisions of this title." The legislative history and judicial interpretation of 8 U.S.C. § 1160(e) and § 1329 confirm that Congress did not intend to preclude the type of constitutional challenge brought here under 8 U.S.C. § 1329.[25]

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[24] *See also, Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Bob Jones University v. United States*, 461 U.S. 574, 601-02 (1983); *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982).

[25] Although this Court held in *United States v. Fausto*, 108 S.Ct. 668, 676 (1988) that its interpretation of the Civil Service Reform Act of 1978 did not repeal by implication the Backpay Act, that case is not controlling here. In *Fausto* this Court recognized that the Civil Service Reform Act, "replaced [a] patchwork system with an integrated scheme of administrative and judicial review designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Fausto*, 108 S.Ct. at 672. This Court in *Fausto* found that allowing a separate action under the Backpay Act would, in effect, turn the elements of the statute "upside down and would seriously undermine" them. 108 S.Ct. at 674. Reliance on 8 U.S.C. § 1329 here, however, is consistent with Congress' intent and prior judicial interpretation. There is nothing in the legislative history of the SAW legislation indicating that Congress intended to repeal the use of § 1329 for procedural challenges to unconstitutional agency conduct. Rather, the contrary is true. Furthermore, as demonstrated *infra* at 38-45, the action by plaintiffs enhances, rather than undermines, the structure and purposes of the farmworker legalization program.

Perhaps in recognition of the obvious linguistic difficulty in stretching the term "a determination respecting an application" to cover any and all aspects of the INS' administration of the SAW program, petitioners briefly argue in the alternative that if respondents are in fact challenging INS policies, practices and procedures "wholly apart from [their] concrete application in a particular case," respondents have failed to challenge an identifiable agency action "that is amenable to judicial review." Brief for Petitioners at 19, *citing Lujan v. National Wildlife Federation, et al.*, 110 S.Ct. 3177 (1990).[26] In effect, petitioners contend that nothing other than agency decisions on individual SAW applications can constitute reviewable agency action; if stretching the definition of what is precluded under § 1160(e) will not succeed, petitioners propose to shrink the scope of reviewable agency action to fit the definition.

The term "agency action," however, is not so easily cabined. "Agency action" is expansively defined in the Administrative Procedures Act to "include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Clearly, allegations that the agencies failed to provide competent translation for SAW applicants, refused to allow applicants the opportunity to present witnesses during the interviews, or failed to make a record of the initial interview would each constitute " agency action" under the APA.[27] Petitioners' effort to limit the concept to agency

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[26] Petitioners actually state that "if the complaint were *characterized* as challenging only *an* INS 'practice' wholly apart from its concrete action in a particular case," the complaint would fail to raise a reviewable issue. Pet. Br. at 19 (emphasis added). This statement, as petitioners acknowledge, simply does not reflect respondents' position as respondents are clearly adversely affected." Moreover, the issues raised by petitioners' reference to *Lujan* are not part of or fairly included within the question presented for review. Sup. Ct. R. 14.1.

[27] This is especially true in light of the provision's legislative history, which provides that "[t]he term 'agency action' brings together previously

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"determination[s] respecting" SAW applications is therefore simply unwarranted.[28]

D. The Purpose And Structure Of the SAW Program Fully Supports Respondents' Jurisdictional Claim

Far from displacing Congressional policy choices as alleged by petitioners, interpreting § 1160(e) to permit district

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defined terms in order to simplify the language of the judicial-review provisions of Section 10 *and to assure the complete coverage of every form of agency power, proceeding, action or inaction.* In that respect, *the term includes the supporting* procedures, findings, conclusions, or statements or reasons or basis for the action or inaction." *F.T.C. v. Standard Oil of California*, 449 U.S. 232, 238 n.7 (1980), *quoting* S. Doc. No. 248, 79th Cong., 2d Sess. 255 (1946) (emphasis added). *See also, Independent Broker-Dealers' Trade Association v. Securities and Exchange Commission*, 442 F.2d 132, 143 (D.C. Cir. 1971) (§ 25 (a) of the Securities and Exchange Act "applies in terms only to 'orders,' a narrower concept than that of 'agency action' reviewable in district courts"); *Kixmiller v. Securities and Exchange Commission*, 492 F.2d 641 (D.C. Cir. 1974) [same].

[28] Further, contrary to petitioners' assertion, Pet. Br. at 19, the actions sought to be reviewed here bear no similarity to those presented in *Lujan*. The procedures, policies, and practices challenged here by respondents are described with precision and particularity, and represent a discrete and fixed set of agency actions in the SAW adjudicative process. Plaintiffs Complaint ¶¶ 86, 87; J.A. 44-45. In contrast, the "land withdrawal review program" challenged in *Lujan* is a catch-all term which "does not refer to a single [agency] order or regulation, or even to a completed universe of particular [agency] orders and regulations," but merely to "the continuing (and thus constantly changing) operations of the [agency]." *Lujan*, 110 S.Ct. at 3189. This Court specifically noted in *Lujan* that if the challenge there was to policies that applied "across-the-board," the APA would provide review to a person adversely affected. *Lujan*, 110 S.Ct. at 3189-90 n.3.

Respondents' action failed in *Lujan* because "wholesale . . . programmatic improvements are normally made" in the halls of Congress or the offices of the Department instead of in the courts. *Lujan*, 110 S.Ct. at 3190. In contrast, respondents here do not seek an overhaul of the statute, nor a change of its regulations. Respondents simply seek to ensure that the agency acts in accord with constitutional due process requirements and consistent with the clear intent of Congress.

court review in the circumstances of this case would clearly effectuate the intent of Congress. In contrast to the dubious evidence of Congressional intent relied on by petitioners in support of their jurisdictional theory, the unambiguous evidence demonstrates that Congress' stated policies would be furthered by permitting district court review.

Congress clearly intended a "generous" legalization program. Legalization was motivated in part by humanitarian concerns for aliens who were long time residents of the United States,[29] but there were more pragmatic concerns as well. First, legalization enables the INS to focus its resources on the illegal entry of new aliens, thereby giving the United States more "enforcement for its dollar." S. Rep. No. 132, 99th Cong., 1st Sess. 16 (1985); *see* H.R. Rep. No. 682, Pt. 1, *supra* at 49. Second, legalization would "eliminate the illegal subclass now present in our society," whose members' weak bargaining position (stemming from their illegal status) was eroding U.S. wages and working conditions. S. Rep. No. 132, *supra* at 16.[30] Third, the SAW program was specifically meant to address the labor needs of agricultural employers.[31] To be effective in these goals it was essential that the legalization programs attract a large majority of eligible aliens. To this end, Congress intended a "generous program" that would be "implemented in a liberal and generous fashion" to "ensure true resolution of the problem and . . . ensure that the program [would] be a one-time program." H.R. Rep. No. 682, Pt. 1, *supra* at 49, 72.

Congress also clearly acknowledged the special problems that alien farmworkers would have in qualifying for legalization and sought to ease that burden. For example, in recognizing that many of the alien farmworkers were illiterate,

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[29] *See, e.g.*, H.R. Rep. No. 682, Pt. 1, *supra* at 49.

[30] *See also* 132 Cong. Rec. H9724 (daily ed. Oct. 9, 1986) (comments by Congressman Schumer, one of the proponents of the SAW legislation).

[31] For this reason, SAW eligible aliens who had actually left the United States to return to their home countries were allowed to apply outside the United States. 8 U.S.C. § 1160(b)(1)(B).

Congress exempted the SAWs from the language and citizenship requirements placed on temporary residents under the general legalization program. *Compare* 8 U.S.C. § 1255a(b)(1)(D) with 8 U.S.C. § 1160(a)(2). Most importantly, Congress recognized the unfairness that would result if farmworkers were required to document their work histories with non-existent payroll records, and accordingly, created a presumption in favor of worker evidence. 8 U.S.C § 1160(b)(3). Congress did not simply entrust policy-making in this regard to the Attorney General, but spelled out in the Conference Report its intent that the liberal standards of proof embodied in the Fair Labor Standards Act case law should apply. *See*, H.R. Conf. Rep. No. 1000, *supra* at 97.[32]

For the program to succeed, literally hundreds of thousands of poor, undereducated alien farmworkers, many of whom lived in isolated rural communities, had to be induced to come forward within the eighteen (18) month "window of opportunity" for filing applications. As noted previously, the efforts of the QDEs in providing the aliens with accurate information about the program and its requirements were thought to be key.[33] However, this effort would be utterly frustrated, as here, when local INS officials change the program's requirements in mid-stream to meet the exigencies of the moment. Pet. App. 32a, 36a.

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[32] With respect to the stay of deportation or exclusion granted applicants who made a nonfrivolous case of eligibility, the Conferees were even more specific in stating their intent that the INS allow aliens to qualify by making a declaration setting forth certain facts: "[t]he Conferees intend that the INS not go beyond these criteria in seeking to determine whether an alien has made a nonfrivolous case for eligibility. To do otherwise may undermine the purposes of this section, viz., to encourage undocumented workers to come forward and seek to obtain legal status." H.R. Conf. Rep. No. 1000, *supra* at 97.

[33] Senator Simpson, in a speech on the Senate floor urging adoption of the Conference version, underscored that the program would work only if it were widely publicized: "[s]o when they legalize they will have to know; as that call goes out, that this legalization period is existent, that they must come forward because this is the last call. This is the first call, and the last call, a one-shot deal. Come on out. Go to your church. We are not trying to fool you this time." 132 Cong. Rec. 33,217 (1986).

The purpose of the judicial review provisions of IRCA was to achieve finality, speed and the smooth operation of the system, and it would frustrate that purpose to read § 1160(e) to require that INS adjudicate thousands of cases under procedures which are constitutionally defective, without any possible correction until the application period expired.

In view of the purposes and policies which underlie the SAW program, petitioners' interpretation of § 1160(e) is simply untenable. It would have the anomalous result of: (1) delaying immeasurably, if not precluding entirely, resolution of claims that the agency adopted policies that systematically and illegally obstructed the end sought to be achieved by the SAW program; (2) relegating the QDEs which Congress had intended to play a key role in the legalization effort to waiting on the sidelines while their credibility, and thus their effectiveness, was undermined by INS conduct which rendered their advice and counsel worthless; and (3) requiring the courts of appeal to address on a case-by-case basis and with an inadequate record claims that can be efficiently and adequately resolved only in the forum of a trial court. In short, petitioners' view of the SAW legislation would impute to Congress a desire to obtain "nonuniformity, uncertainty and slowness in getting major legalization questions settled." *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1352 (D.C. Cir. 1989) (Wald, J., dissenting). Plainly Congress did not intend such a result, which would be counter to the many clear signals which Congress actually sent and which would subvert the major goals of the Act. It is much more sensible to assume that, in the absence of specific language precluding review, Congress meant to allow direct review so that egregious abuses of authority by the agency could be quickly corrected.

The structure and purpose of the SAW program, by encompassing community organizations including QDEs, further support these organizations' independent judicial actions. Through IRCA, Congress has recognized the importance of community organizations, such as plaintiff organizations, and has accorded many of them – including MRS – the special status of Qualified Designated Entities. *See*, 8 U.S.C.

§§ 1160(b)(1)(A) and (b)(2). In doing so, Congress recognized the special relationship between these community organizations and the individual nonimmigrant aliens:

> The Committee has learned that legalization programs in other countries have usually produced a low rate of participation among the eligible candidates. At least part of the reason is distrust of authority and lack of understanding among the undocumented population. The Committee hopes that by working through the voluntary agencies, the Attorney General might be able to encourage participation among undocumented aliens who fear coming forward. To assist in this endeavor, the bill authorizes the Attorney General to fund outreach service . . .

H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1 at 73 (1986).[34]

The QDEs are required by the terms of their cooperative agreements with INS to perform the function of intermediaries between INS and the Act's beneficiaries. They are charged by IRCA with responsibility for outreach to the alien community, counseling of aliens and processing their applications for legalization.[35] Permitting the QDEs and membership

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[34] The importance of voluntary agencies and other organizations to the success of the legalization effort was recognized throughout the legislative debate that led up to the passage of IRCA. During a 1983 floor debate, Senator Simpson, IRCA's main sponsor in the Senate, stated: "[I]t is obvious that we cannot do the job that is required without the spirited assistance of voluntary agencies in this country, the nonvoluntary agencies and the service groups, and that is indeed what we envision . . . Further, the bill provides and this is a very important part of it, that voluntary agencies and other private and public organizations shall assist the aliens in preparing their applications for benefits under this program. Those are the organizations that will have all of the expertise and the skills necessary to assist the aliens in preparing the necessary documentation. It is going to be a case of, 'there is how you do it.' You may be assured that they will assist the aliens in preparing their documentation. They will also assist in the educational outreach program so that each and every eligible alien will be aware of the requirements . . . " 129 Cong. Rec. 12,813-14 (1983).

[35] Contrary to petitioners' brief, which suggests that the omission to sue from "Congress' careful description of the functions of a qualified designated

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organizations such as HRC to sue furthers the statutory purpose of providing potential applicants with accurate information regarding the program's requirements *before* they risk exposure of their illegal status by filing an application.

While essentially conceding that HRC and MRS meet the test for organizational standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982),[36] petitioners argue that the

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entity" is somehow evidence that no such role was intended, the description of the QDEs' functions in IRCA is sparse; applications may be filed with designated agencies which agree to forward the application to the INS after the alien has consented to such forwarding, 8 U.S.C. § 1160(b)(1)(A), and the INS is not permitted to have access to the files and records of the QDEs relating to an alien without the alien's consent. 8 U.S.C. § 1160(b)(5). This is not like *United States v. Erika, Inc.*, 456 U.S. 201 (1982), where the failure to authorize review for amount determinations of part B Medicare awards "[i]n the context of the statute's precisely drawn provisions" coupled with supporting legislative history led to the conclusion that Congress deliberately intended to foreclose further review. Nevertheless, it is reasonably clear from petitioners' own description that the purpose of the QDEs was "to provide information and assistance in a risk-free environment to aliens seeking to apply for legalization/special agricultural worker temporary residence," and that this effort was "designed to encourage mass participation by eligible applicants." *See*, Notices; Vol. 52 Fed. 9717, 9718 (March 26, 1987) [setting forth the terms of the cooperative agreements between the INS and the QDEs].

[36] HRC also brought suit "as a representative of its members, who have or *will be* denied Temporary Resident status, stays of deportation and work authorization" as a result of petitioners' policies and practices. Compl. para. 17; J.A. 23-24 (emphasis added). Claiming that "individual SAW applicants may not circumvent IRCA's judicial review provisions by commencing an action in district court," petitioners assert that HRC is without representative standing because under *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), there must be a showing that the members could sue "in their own right." However, the question is not whether there were any individual members of HRC who might have circumvented the administrative process in order to challenge determinations in their individual cases. Rather, it is whether there were individual members of HRC who had yet to apply or be interviewed. Such individuals would have a live interest in challenging the INS policies that would support standing in this case. There is no question that among HRC's membership are many such individuals. *See UAW v. Brock*, 477 U.S. 274, 283-85 (1986).

absence of a specific provision in IRCA giving such organizations judicial recourse impliedly precludes their claims under this Court's holding in *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). This construction stands the presumption of reviewability on its head.

Moreover, *Block* is inapposite. The Marketing Act at issue in *Block* contemplated "a cooperative venture among the Secretary [of Agriculture], handlers and producers the principal purposes of which [were] to raise the price of agricultural products and to establish an orderly system for marketing them," 467 U.S. 340 at 346. Handlers and producers – but not consumers – were entitled to participate in adoption and retention of marketing orders. The Act further provided for agreements among the Secretary, producers and handlers, for hearings among them, and for votes by producers and handlers. Nowhere in the Act, however, was there an express provision for participation by consumers in any proceeding. Accordingly, the Court concluded that in such a elaborate administrative scheme, the omission of any provision allowing for participation of consumers was sufficient reason to preclude judicial review at the behest of consumer groups. *Id.* at 347.

The situation here is much different. IRCA, unlike the Marketing Act, does not provide an elaborate structure for balancing competing private interests which might be upset by factoring yet another interest group into the equation. IRCA formally recognizes the QDEs as both the alien's representative and his or her "best friend." The statutory language of the SAW program *expressly* provides for the participation of QDEs in the process. 8 U.S.C. § 1160(b)(2). Litigation by the QDEs to redress their own injuries, therefore, furthers the purposes of the Act.

In contrast to *Block*, petitioners are unable to point to any direct statutory language or legislative history evidencing a Congressional intent to preclude review at the behest of QDEs and other organizations assisting aliens under the SAW statute. Petitioners' argument that Congress intended to preclude review rests on the fact that Congress expressly provided for review of individual determinations in § 1160(e) and did not

expressly authorize QDEs and other organizations to sue. This argument would invert the presumption of judicial review repeatedly acknowledged by this Court. Indeed, when the government made the same argument previously, this Court rejected it. *Bowen*, 476 U.S. at 674-75.

E. The Legislative History Of The Act Demonstrates That Congress Has Already Rejected The Limitation On Class Actions That Petitioners Seek From This Court

Petitioners contend there is no evidence that Congress intended the district courts to entertain constitutional challenges to INS conduct in administering the SAW program. However, the real question is not whether there is evidence that Congress specifically authorized review of agency action, since under this Court's holding in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 141 (1967), such reviewability is to be presumed. Rather, the question is whether there exists clear and convincing evidence of a contrary intent. Evidence regarding intent to restrict reviewability must consist of " 'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional, intent to preclude judicial review that is 'fairly discernible' in the detail of the legislative scheme." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 673 (1986). *Accord, Traynor v. Turnage*, 108 S.Ct. 1372, 1378 (1988).

Petitioners essentially proffer only one argument based on IRCA's legislative history. They contend that since the Senate abandoned a strict Senate provision precluding all judicial review of all aspects of the legalization program, by class action or otherwise, and acceded to the House provision which specifically provided for limited judicial review of denials of SAW applications, Congress could not have intended to open the door to the kind of action brought here. As a general matter, this Court has held that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and

indeterminate evidence of legislative intent." *Abbott Laboratories*, 387 U.S. at 141. Here, the evidence clearly points the other way; Congress specifically rejected a broadly worded provision which arguably would have barred the present suit for a much narrower one.[37] "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1218 (1987).[38]

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[37] The bill in question, S. 1200, did not even contain a SAW program. S. 1200 would have established a general legalization program and explicitly provided that "there shall be no judicial review (by class action or otherwise) of a decision or determination under this section," and further provided that an alien denied adjustment of status under this legalization program "may not raise a claim concerning such adjustment in any proceedings of the United States or any State involving the status of such alien . . . " S. 1200, 99th Cong., 2d Sess., § 202(f) (1985). H.R. 3810 did provide for a SAW program and as passed by the House, contained what is now 8 U.S.C. § 1160(e). The Conference substitute adopted the House provision including the provisions with respect to judicial review. *See*, H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 96 (1986).

[38] Petitioners attempt to bolster their contention that the compromise struck by the Conferees meant to preclude all review other than review of individual determinations by pointing to a statement made by Senator Cranston during a 1983 floor debate over an immigration bill that ultimately was fatally stalled in conference in the 98th Congress. Senator Cranston advocated a judicial review amendment to the bill under discussion, S. 529, that would have "merely permit[ted]" a "very limited form of judicial review that "would [have been] available only when an improper denial of legalization is raised as a defense in a deportation proceeding already subject to judicial review." 129 Cong. Rec. 12,810 (1983). Contrary to the impression conveyed by petitioners, the Cranston amendment cannot be described as "much like the judicial provision later enacted in IRCA." S. 529 provided that "[n]o decision or determination made by the Attorney General under this Section may be reviewed by any court of the United States or of any State," S. 529, 98th Cong., 1st Sess. § 301(g)(1) (1983) (as reported). The Cranston amendment created a single exception to § 301(g)(1) to permit review of denials of adjustment if such denial was first raised in a deportation proceeding. *See*, 129 Cong. Rec. 12,810. By contrast, in the compromise adopted by the conference committee (fully three years after Senator Cranston's remarks),

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The language and legislative history of IRCA indicate that in enacting § 1160(e) Congress intended to "ensure that fair administrative reviews are conducted by INS and to provide for the complete consideration of all possible evidence to determine legalization" while at the same time, not "unduly burden[ing] the Government or the applicants with an excessively complex process." 130 Cong. Rec. 17,229 (1984) (remarks of Rep. Mineta).[39] In enacting IRCA's provision barring pre-deportation-order review of "a determination respecting an application for adjustment," 8 U.S.C. § 1160(e)(1), Congress obviously decided to create, for the SAW program, a narrow channel for judicial review of INS' fact-finding and law-application in individual cases.[40] The

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the Senate dropped its broadly worded version precluding review of any "decision or determination under this section," and acceded to the House version.

[39] Had Congress made no express provision concerning judicial review, under the Administrative Procedures Act, an alien denied SAW status could probably have proceeded to district court immediately to contest the denial, with an appeal to the court of appeals thereafter. Then if the courts sustained the denial and the INS subsequently commenced deportation proceedings against the alien, the alien could still litigate his deportability before an immigration judge, followed by appeal to the Board of Immigration Appeals ("BIA"), and then judicial review again, this time before the court of appeals in accordance with INA § 106(a). The clear intent of § 1160(e) is to reduce delay and possible manipulation by ensuring that the court of appeals only has to review the alien's case once, by delaying review until all possible defenses or claims for relief from deportation have received final administrative resolution.

[40] The legislative history shows that not only did Congress not intend to preclude class action lawsuits such as this one, but also that Congress understood the term "a determination respecting an application" to refer to an individual adjudication. The Senate bill limited applicants to a single level of administrative appellate review "of a final determination respecting an application for adjustment of status." S. 1200, § 202(f)(4). Like the House version ultimately adopted, such review would be based solely upon "the administrative record established at the time of the determination on the application." *Id.* That Senate provision was in addition to § 202(f)(1), which as discussed

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exercise of jurisdiction over this case is in no way inconsistent with that goal.[41]

Moreover, Congress created IRCA's judicial review provisions against a well-established background of existing case law holding that 8 U.S.C. § 1105a does not preclude broad-based statutory and constitutional challenges. *See, Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1032-33 (5th Cir. Unit B 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984) (*en banc*), *aff'd*, 472 U.S. 846 (1985) (expressing no view on jurisdictional issues); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986).[42] When adopting a new law

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previously, precluded review of any "decision or determination under this section." *Id.*, § 202(f)(1). Thus, when the Senate dropped its comprehensive preclusion and agreed to retain only the more limited one involving "determination[s] respecting an application," it must have surely known that the abandonment contemplated the possibility of judicial review of decisions and determination outside the ambit of individual adjudications. Further support for this view is found in comparing the committee reports of the two houses. The Senate report accompanying S. 1200 stated that the preclusion attached to "a decision or determination made with respect to *the legalization program*." S. Rep. No. 132, 99th Cong., 1st Sess. 48 (1985). By contrast, the House Committee Report stated that the language ultimately adopted by Congress provided for limited administrative and judicial review of *denials of applications for legalization*. H.R. Rep. No. 682, *supra*, Pt. 1 at 74.

[41] Petitioners think it is "peculiar" that the court of appeals would hear "less important individual cases" while the district courts would review the "much more important cases involving broad questions that would apply to a whole class of aliens." Of course, as this very case demonstrates, the courts of appeal are available to review "the most important cases." Moreover, the division of labor between the appellate and district courts is generally thought to turn on considerations such as the necessity for fact-finding, rather than which court is "more important." In any case, permitting respondents' district court actions is the result that is most "consistent both with Congress' intentions and with the terms by which it has chosen to express those intentions." Cf. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 217-18 (1968).

[42] *See also, NCIR, Inc. v. INS*, 743 F.2d 1365 (9th Cir. 1984), *vacated on other grounds*, 107 S.Ct. 1881 (1987) (8 U.S.C. § 1252(a) does not bar district court jurisdiction where no review of any individual bond determination is sought); *International Union of Bricklayers v. Meese*, 761 F.2d 798,

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incorporating sections of a prior law, Congress can be presumed to have knowledge of the interpretation given to the incorporated law, *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985), and to adopt the interpretation when it incorporates the prior law without change. *Id.*

The very fact that Congress implemented judicial review of legalization denials through the pre-existing statutory structure of 8 U.S.C. § 1105a – without further restriction or of change to that section – establishes that Congress did not seek to alter legislatively the case law on § 1105a with respect to IRCA.

F. The Paramount Role Of The Political Branches In Immigration Matters Claimed By Petitioners Has No Applicability Here

As a last resort, the petitioners argue that judicial review by respondents "is particularly inappropriate in light of the paramount role of the political branches in immigration matters." Pet. Br. at 31. This argument is without merit for several reasons. Immigration matters are not different. This Court has long recognized the presumption of judicial review in immigration matters. *Rusk v. Cort*, 369 U.S. 367 (1962); *Brownell v. We Shung*, 352 U.S. 180 (1956); *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955). Second, respondents challenge procedural deficiencies on constitutional grounds, not substantive determinations of admissibility or excludability. *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the government must respect the procedural safeguards of due process"). *See also, Landon v. Plasencia*, 459 U.S. 21, 32

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801 (D.C. Cir. 1985) (doctrine of nonreviewability of consular decisions is not applicable where plaintiffs do not challenge a particular decision in a particular case of matters which Congress has left to executive discretion but challenge the underlying procedures).

(1982); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Gegiow v. Uhl*, 239 U.S. 3 (1915).

The petitioners' attempt to draw a distinction here between persons who are residents and those who have not yet obtained residency is particularly without force because "in enacting the Special Agricultural Worker program, Congress and the Executive Branch have granted aliens a constitutionally protected right to apply for temporary residency as well as the right to substantiate their claims for eligibility. . . . Once Congress chooses to create such a system of entitlements and promulgates rules which restrict the discretion of administrative offices to grant benefits under the system, a property interest is created that is accorded procedural due process protection. *See, Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972)." Pet. App. 14a.

CONCLUSION

For the foregoing reasons, the decision of the lower court should be affirmed in all respects.

Respectfully submitted,

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